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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER	
CAPPS, KEVIN J	
ART UNIT	**PAPER NUMBER**
1617	

SHORTENED STATUTORY PERIOD OF RESPONSE	NOTIFICATION DATE	DELIVERY MODE
3 MONTHS	02/22/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

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Office Action Summary	Application No.	Applicant(s)	
	10/820,212	KUX ET AL.	
	Examiner	Art Unit	
	Kevin Capps	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *07 December 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *26-54* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *26-54* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Status of the Claims

1. This Office Action is in response to the Remarks and Amendments filed on December 7, 2006. Claims 1-25 have been cancelled and new claims 26-54 have been added. Additionally, Applicant has amended the specification at the paragraph bridging the text on pp. 4-5. The amendment has only corrected what would be understood to be a typographical error because 0.7 mPa is too low of pressure for use in atomization pump devices. As pointed out by Applicant, the Buisson Patent (US 5,388,766) discloses pressures in the MPa range. Thus, the amendment to the specification is not seen to introduce new matter and it has been entered. Claims 26-54 are pending and examined on the merits herein.

2. In view of Applicant's cancellation of claim 1, the rejection under 35 USC § 112, second paragraph, is withdrawn.

3. Claims 1-25 were rejected under 35 USC § 103 over Buisson (Applicant-cited reference on IDS: US 5,388,766) in view of Diec et al. (Applicant-cited reference on IDS: WO 96/28132, using US 6,607,733 as the English-language functional equivalent). The rejection is maintained and restated to address the new claims. Applicant's arguments are addressed below.

4. Claims 1-25 were rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6, 8, and 9 of U.S. Patent No. 6,607,733 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766). The

rejection is maintained and restated to address the new claims. Applicant's arguments are addressed below. The rejection is maintained and restated to address the new claims. Applicant's arguments are addressed below.

5. Claims 1-25 were provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-22 of copending Application No. 10/819,781 in view of Diec et al. (Applicant-cited reference on IDS: WO 96/28132, using US 6,607,733 as the English-language functional equivalent). The rejection is maintained and restated to address the new claims. Applicant has presented no rebuttal arguments against the provisional double patenting rejection.

6. Claims 1-25 were provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 44 of copending Application No. 10/892,159. The rejection is maintained and restated to address the new claims. Applicant has presented no rebuttal arguments against the provisional double patenting rejection.

7. Claims 1-25 were provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-38 and 45-48 of copending Application No. 10/892,159 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766). The rejection is maintained and restated to address the new claims. Applicant has presented no rebuttal arguments against the provisional double patenting rejection.

8. Claims 1-25 were provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-29 of copending Application No. 10/953,587 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766). The rejection is maintained and restated to address the new claims. Applicant has presented no rebuttal arguments against the provisional double patenting rejection.

Claim Rejections - 35 USC § 103

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

10. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

11. Claims 26-54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Buisson (Applicant-cited reference on IDS: US 5,388,766) in view of Diec et al. (Applicant-cited reference on IDS: WO 96/28132, using US 6,607,733 as the English language functional equivalent).

12. Buisson teaches a high pressure dispensing and atomization system comprising a high viscosity fluid product, a container, and a pump sprayer for atomizing the fluid, said pump sprayer comprising a piston which pressurizes the fluid. Buisson teaches that the fluid is released through swirl type atomizer nozzles causing the fluid to rotate when released (claim 1; col. 4, line 39-col. 7, line 41). Buisson teaches that an operating pressure of at least about 690 kPa (0.69 MPa) is preferred, which overlaps the herein-claimed pressure of at least 0.7 MPa (col. 11, lines 16-27). Buisson teaches that the pump atomizer is for dispensing high viscosity fluid products such as, among other things, health and beauty care products (col. 10, line 58-67).

13. Buisson does not teach that the high viscosity fluid product in the atomization system is the oil-in-water emulsion antiperspirant composition of the instant invention.

14. Diec et al. teach the oil-in-water emulsion antiperspirant composition of the instantly claimed antiperspirant product. Specifically, Diec et al. teach an oil-in-water emulsion comprising an emulsifier at less than 20% by weight, wherein the emulsifier is selected from the group consisting of polyethoxylated and polypropoxylated oil-in-water emulsifiers, and wherein the microemulsion is prepared by mixing the components and varying the temperature so that the mixture passes through a phase inversion range (claim 1). Diec et al. teach that the microemulsion can be used in the formulation of deodorants and that "customary antiperspirant active compounds" can be incorporated into the compositions (col. 30, lines 37-44; col. 26, lines 49-52). Diec et al. exemplify the incorporation of the emulsifiers and aluminum chloride antiperspirant salts at concentrations within the herein-claimed ranges (Examples 1-8 and 26). Diec et al.

teach that cosmetic deodorants comprising the microemulsion can be dispensed from pump devices (col. 26, lines 53-59).

15. It would have been obvious to the person of ordinary skill in the art at the time of invention to incorporate the oil-in-water emulsion antiperspirant composition of Diec et al. into the atomization system of Buisson to arrive at the instantly claimed invention.

16. The person of ordinary skill in the art would have been motivated to incorporate the oil-in-water emulsion antiperspirant composition of Diec et al. into the atomization system of Buisson because Diec et al. teach that pump devices can be used to dispense the oil-in-water emulsion antiperspirant compositions and Buisson teaches that his pump device for atomizing viscous fluids can be used for dispensing health and beauty care products. The person of ordinary skill in the art would expect that the composition of Diec et al. could be successfully dispensed from the atomization system of Buisson because Buisson teaches that the system is designed for the purpose of dispensing such compositions.

Double Patenting

17. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422

F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

18. Claims 26-54 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6, 8, and 9 of U.S. Patent No. 6,607,733 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766).

19. As discussed above, '733 teaches oil-in-water emulsions comprising emulsifiers and crosslinkers at the herein-claimed concentrations.

20. The claims of '733 do not teach the incorporation antiperspirant salts into the emulsion, or incorporation of the emulsion into a pump atomizer.

21. As discussed above, Buisson teaches the pump atomizer of the instant invention.

22. It would have been obvious to the person of ordinary skill in the art to incorporate antiperspirant salts into the emulsion of '733, and to further incorporate the resulting antiperspirant microemulsion into the pump atomizer of Buisson to arrive at the instantly claimed product.

23. The person of ordinary skill in the art would have been motivated to incorporate antiperspirant salts into the emulsion of '733 because claim 6 of '733 suggests the incorporation of well known cosmetic or dermatological agents into the microemulsions, and antiperspirant salts, such as aluminum salts, are well known to the ordinary skilled artisan for use as cosmetic or dermatological antiperspirant agents. Aluminum salts are

in fact exemplified in the specification of '733 as preferred additives for the dermatological formulations (Examples 1-8 and 26). Thus, the person of ordinary skill in the art would expect that antiperspirant salts could be effectively incorporated into the microemulsions of '733.

24. The person of ordinary skill in the art would have been motivated to incorporate the resulting antiperspirant microemulsion into the pump atomizer of Buisson because it is well known in the art that products are needed for dispensing and applying such dermatological compositions as in '733. The person of ordinary skill in the art would expect that the pump atomizer of Buisson could be used to dispense the antiperspirant microemulsion of '733 because Buisson teaches that the pump atomizer is for dispensing such compositions.

25. Claims 26-54 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-22 of copending Application No. 10/819,781 in view of Diec et al. (Applicant-cited reference on IDS: WO 96/28132, using US 6,607,733 as the English-language functional equivalent).

26. '781 teaches an antiperspirant product comprising an oil-in-water microemulsion and a pump atomizer, wherein the microemulsion comprises the emulsifiers and antiperspirants at the herein-claimed concentrations, and wherein the pump atomizer is identical to the instantly claimed invention.

27. '781 does not teach that the oil-in-water microemulsion further comprises crosslinkers.

28. Diec et al. teach that for oil-in-water emulsions comprising the herein-claimed emulsifiers at the herein-claimed concentrations, the addition of crosslinkers is preferred.

29. It would have been obvious to the person of ordinary skill in the art at the time of invention to incorporate the crosslinkers of Diec et al. into the oil-in-water emulsion of '781 to arrive at the instantly claimed invention.

30. The person of ordinary skill in the art would have been motivated to incorporate the crosslinkers of Diec et al. into the oil-in-water emulsion of '781 with a reasonable expectation of success because claim 5 of '781 allows for the addition of additives and Diec et al. teach that crosslinkers are preferred additives for oil-in-water emulsions.

This is a provisional obviousness-type double patenting rejection.

31. Claims 26-54 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 44 of copending Application No. 10/892,159.

32. Claim 44 of '159 teaches an atomizer pump container comprising an oil-in-water emulsion comprising the herein-claimed emulsifiers at the herein claimed concentrations, the herein-claimed antiperspirants at the herein-claimed concentrations, and polyols. Page 18 of '159 defines the polyols as crosslinkers.

33. '159 does not teach all of the herein-claimed concentrations of the polyols.

34. It would have been obvious to the person of ordinary skill in the art at the time of invention to optimize the concentration of the polyols in the microemulsion of '159 using routine experimentation to arrive at the instantly claimed compositions.

35. The person of ordinary skill in the art would have been motivated to optimize the concentration of the polyols in the composition of '159 with a reasonable expectation of success because optimization of the concentration of known components in a dermatological formulation is a common practice in the art and is a matter of routine experimentation for the ordinary skilled artisan. Applicant's attention is directed to *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955) which states, "Where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." See MPEP § 2144.05, "II. Optimization of Ranges".

This is a provisional obviousness-type double patenting rejection.

36. Claims 26-54 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-38 and 45-48 of copending Application No. 10/892,159 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766).

37. '159 teaches an oil-in-water emulsion comprising the herein-claimed emulsifiers at the herein-claimed concentrations, the herein-claimed antiperspirants at the herein-claimed concentrations, and polyols. Page 18 of '159 defines the polyols as crosslinkers. '159 also teaches methods of using the compositions.

38. '159 does not teach all of the herein-claimed concentrations of the polyols. Claims 1-38 and 45-48 of '159 do not teach the microemulsion as being in a pump atomizer.

39. As discussed above, the composition of '159 is not patentably distinct from the instantly claimed compositions because it is a matter of routine experimentation for the ordinary skilled artisan to arrive at the preferred concentrations of the components of the microemulsion.

40. As discussed above, Buisson teaches the pump atomizer of the instant invention.

41. It would have been obvious to the person to optimize the concentration of the crosslinkers in the compositions of '159 and to incorporate the composition into the pump atomizer to Buisson to arrive at the instantly claimed product.

42. The person of ordinary skill in the art would have been motivated to incorporate the antiperspirant microemulsion of '159 into the pump atomizer of Buisson because it is well known in the art that products are needed for dispensing such dermatological compositions as in '159. The person of ordinary skill in the art would expect that the pump atomizer of Buisson could be used to dispense the antiperspirant microemulsion of '159 because Buisson teaches that the pump atomizer is for dispensing such compositions.

This is a provisional obviousness-type double patenting rejection.

43. Claims 26-54 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-29 of

copending Application No. 10/953,587 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766).

44. '587 teaches oil-in-water emulsions comprising the herein-claimed emulsifers, crosslinkers, and antiperspirants.

45. '587 does not teach all of the herein-claimed concentrations of the components. '587 does not teach incorporation of the emulsion into a pump atomizer.

46. For the reasons discussed above, the compositions of '587 are not patentably distinct from the instantly claimed compositions because it is a matter of routine experimentation for the ordinary skilled artisan to arrive at the preferred concentrations of the components of the microemulsion.

47. As discussed above, Buisson teaches the pump atomizer of the instant invention.

48. It would have been obvious to the person to optimize the concentration of the crosslinkers in the compositions of '587 and to incorporate the composition into the pump atomizer to Buisson to arrive at the instantly claimed product.

49. The person of ordinary skill in the art would have been motivated to incorporate the antiperspirant microemulsion of '587 into the pump atomizer of Buisson because it is well known in the art that products are needed for dispensing such dermatological compositions as in '587. The person of ordinary skill in the art would expect that the pump atomizer of Buisson could be used to dispense the antiperspirant microemulsion of '159 because Buisson teaches that the pump atomizer is for dispensing such compositions.

This is a provisional obviousness-type double patenting rejection.

Response to Arguments

50. Applicant's arguments filed December 7, 2006, have been fully considered but they are not persuasive.

51. Regarding the rejection of claims 1-25 under 35 USC § 103 over Buisson (Applicant-cited reference on IDS: US 5,388,766) in view of Diec et al. (Applicant-cited reference on IDS: WO 96/28132, using US 6,607,733 as the English language functional equivalent), Applicant argues that Buisson does not teach that his pump atomizer can be used for dispensing an antiperspirant microemulsion gel. Applicant argues that the pump atomizer of Buisson is primarily for food products and that the only health and beauty care product exemplified for use in the pump atomizer is hair spray. Applicant further argues that there is no reason to incorporate the antiperspirant gel of Diec et al. into the pump atomizer of Buisson because Diec et al. do not suggest dispensing the gel from such a pump atomizer.

52. These arguments are not found persuasive because the combined references suggest incorporating the antiperspirant microemulsion gels of Diec et al. into the pump atomizer of Buisson. Specifically, Buisson gives substantial guidance toward the incorporation of other types of high viscosity products into the dispenser other than food products. In the "Summary of the Invention" at col. 3-4, the use of the pump atomizer for food products is not mentioned once. It is only in the detailed description of the invention that there is a discussion of the dispensation of food products. However, Buisson discusses using the pump atomizer to dispense a range of other products,

including "lubricating oils, liquid soaps, laundry detergents, dishwashing detergents, pretreaters, hard surface cleaners, paints, polishes, window cleaners, rust preventatives,..."(col. 10, ll. 61-67). None of these products are food products. Thus, Buisson envisions using the pump atomizer to dispense a wide range of products. Further, Buisson clearly indicates the atomizer can be used to dispense health and beauty care products. And although he exemplifies only hair sprays as a health and beauty product, the person of ordinary skill in the art would understand that antiperspirant gels fall within this genus of products and could be dispensed from the atomizer, particularly since Buisson discusses that the atomizer can be used to dispense viscous products without requiring dilution, which would suggest gels could be used, such as the viscous microemulsion gels of Diec et al.

53. Diec et al. also do not teach away from the use of a pump device as disclosed by Buisson. Diec et al., as Applicant points out, do suggest that pump devices should be used to dispense aerosols. However, they state that "normal bottles and containers" can be used to dispense the products. This can be interpreted as meaning dispensers that are known and routinely used in the art. Further, it is possible that Diec et al. did not appreciate that the more viscous formulations, such as the gels, could be dispensed from pump devices. However, this is the problem that Buisson solves with his dispenser. Namely, Buisson provides a pump atomizer dispenser for viscous products, such as the microemulsion gels of Diec et al. Thus, upon reading the two documents, the person of ordinary skill in the art would understand that the pump atomizer of Buisson could be used to dispense the antiperspirant gels of Diec et al.

54. Applicant argues that the obviousness-type double patenting rejection over Diec et al. (US 6,607,733) in view of Buisson (US5,388,766) should be withdrawn for the reasons set forth against the § 103 rejection. The rejection is maintained for the reasons set forth above in response to the rebuttal arguments.

Conclusion

55. No claims are allowed.

56. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kevin Capps whose telephone number is (571) 272-8646. The examiner can normally be reached on Monday-Friday, 7:30am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan can be reached on (571) 272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

KC

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